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RECORD, CASE No. 14,191.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., ~~808~~. 454 206

SARAH A. CHAPMAN, RUTH NEWSOM, BENJAMIN T. HANDLEY, AND HARVEY HANDLEY, APPELLANTS,

vs.

ELIZABETH HANDLEY, JOHN HANDLEY, WILLIAM F. HANDLEY, CHARLES T. HANDLEY, AND EMMA N. HANDLEY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED SEPTEMBER 29, 1890.

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OCTOBER TERM, 1891.

TERM No., 808.

SARAH A. CHAPMAN, RUTH NEWSOM, BENJAMIN T. HANDLEY, AND HARVEY HANDLEY, APPELLANTS,

vs.

ELIZABETH HANDLEY, JOHN HANDLEY, WILLIAM F. HANDLEY, CHARLES T. HANDLEY, AND EMMA N. HANDLEY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

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a In the Supreme Court of the Territory of Utah.

In the Matter of the Estate of GEORGE HANDLEY, Deceased. # 94.

Transcript on Appeal.

Sutherland & Judd, att'ys for petitioner-.

Marked: Filed May 19, 1890. Jos. P. Bache, clerk.

1 In the Probate Court of Salt Lake County, Utah Territory.

In the Matter of the Estate of GEORGE HANDLEY, Deceased.

Petition.

The petition of Ruth A. Newsom, *nee* Handley, Benjamin T. Handley, Harvey L. Handley, and Sarah A. Chapman, who respectfully show unto this court—

That George Handley, said deceased, died on the 25th day of May, 1874, intestate, at Salt Lake City, in Salt Lake county, Territory of Utah, leaving an estate in said county and heirs-at-law to inherit the same, residing in said county, as hereinafter set forth.

That on the 12th day of April, 1888, Elizabeth Handley, widow of said deceased, was appointed by the said court administratrix
2 of said estate; that she qualified and entered upon the duties of said office and ever since has been and now is such administratrix; that she caused notice to creditors to be published as required by law, and the time for presentation of claims has now elapsed; that said administratrix filed an inventory of said estate showing that it consisted of the following real estate, situate in Salt Lake county, Utah:

Lot 11, block 16, five-acre plat A, about 4½ acres, appraised at $4,300.

Lot 12, in block 16, in said plat, appraised at $2,650.

Lot 13, in block 16, in said plat, appraised at $2,500.

Lot 1, block 17, in said plat, appraised at (3 acres) $1,500.

Lot 10, in block 11, in five-acre plat C, three acres, appraised at $900.

Lot 11, in block 11, in said plat C, five acres, appraised at $500.

Lot 2, in block 30, in plat C, five acres, appraised at $1,500.

That said property is now worth, exclusive of the last parcel, $25,000 or more.

That pursuant to an order of this court a sale was made and confirmed January 16, 1890, of said last-mentioned parcel for four thousand six hundred dollars; and after paying the account, for which money was needed through such sale to pay, there now remains in the hands of said administratrix the sum of $3,916.92, as is shown in said administratrix'- account.

The administratrix has filed her final account, and the 10th day of March, 1890, has been fixed by said court for hearing the same.

3 Said George Handley died, leaving him surviving the said Elizabeth Handley, his widow, and his eight children and heirs-at-law, named, respectively, John Handley, William F. Handley, Charles J. Handley, Emma Handley, Ruth A. Newsom, Benjamin T. Handley, Mary F. Handley, and Harvey L. Handley. The four first named are the children of said deceased and said Elizabeth, his lawful wife, and the last four were children of said deceased and your petitioner, Sarah A. Chapman, his plural wife according to the tenets and rites of the Mormon church; that all said children are now living except Mary Handley, who died, without issue or having been married, on the 28th day of September, 1879; that all said children are of age except said Harvey Handley, who is sixteen years of age.

Your petitioners therefore pray that they may be recognized as heirs-at-law of said George Handley, deceased, equally with said four children of said deceased first above named, your petitioner Sarah A. Chapman, as mother in place and representative of said Mary Handley, deceased, and that after the hearing upon said account of said administratrix that the said estate may be divided among and distributed to said heirs-at-law according to their respective interests; that one-half of said estate may be apportioned to your petitioners.

SUTHERLAND & JUDD,
Att'ys for Petitioner.

4 TERRITORY OF UTAH, } ss:
Salt Lake County, }

Sarah A. Chapman, being duly sworn, says: I am one of the petitioners named above. I have heard read the foregoing petition and know its contents. It is true of my own knowledge.

SARAH A. CHAPMAN.

Sworn to and subscribed before me this 5th day of March, 1890.
[SEAL.] J. J. SNELL.

5 In the District Court for the Third Judicial District of Utah Territory.

Stipulation.

It is hereby stipulated that the facts are as stated in the petition of Sarah A. Chapman and others for a distribution of the said estate filed herein; that said facts may be received as true and sufficient finding on the hearing of said petition, and this other fact shall also be added to the facts stated in said petition and as part of the facts, viz: That said Sarah A. Chapman became the plural wife of said George Handley, by the rites and ceremonies of the Mormon church, on the 18th day of May, 1866.

Dated April 5th, 1890.

SUTHERLAND & JUDD,
Attorneys for Petitioners.
A. BROWN,
HOGE & BURMESTER,
Attorneys for Mrs. Elizabeth Handley and Her Children.

6 In the District Court for the Third Judicial District of Utah Territory.

Findings.

Be it remembered that upon this day this cause came on to be heard upon the appeal of Sarah A. Chapman, Ruth Newsom, Benjamin T. Handley, and Harvey Handley from the probate court of Salt Lake county, before the Honorable Thomas J. Anderson, one of the judges of said court; whereupon the following finding of facts and decree were made by said court:

I. That George Handley, who was a citizen and resident of Salt Lake City and county, died on the 25th day of May, 1874, intestate, at his residence, in said city and county, leaving an estate which is at this date and at the date of the filing of the petition in this case was of the value of thirty thousand dollars.

That on the 12th day of April, 1888, Elizabeth Handley, widow of said deceased, was appointed by the probate court of Salt
7 Lake county administratrix upon said estate, and that she duly qualified and entered upon the duties of said office, and ever since has been and now is such administratrix.

That she caused notice to creditors to be published as required by law, and the time for presentation of claims has now elapsed.

That said administratrix filed an inventory of said estate showing that it consisted of real estate situated in Salt Lake county, Utah Territory, which, as before said, the court finds to be of the value of thirty thousand dollars.

That said administratrix filed her final account before said probate court, which, on the 10th day of March, 1890, was heard and the said account allowed, and that said estate was at the time of the filing of the petition in this cause ready for distribution and of the value of twenty-five thousand dollars ($25,000).

That said George Handley died, leaving him surviving the said Elizabeth Handley, his widow, and his eight children, named, respectively, John Handley, William Handley, Charles J. Handley, Emma N. Handley, Ruth A. Newsom, Benjamin T. Handley, Mary F. Handley, and Harvey F. Handley.

That the first four named are the children of the said George Handley, deceased, and the said Elizabeth Handley, his lawful wife, and the last four were children of the said deceased and Sarah A. Chapman, his plural wife, married to him according to the tenets and rites of the Mormon church, on the 18th day of May, 1866.

That all the said children above mentioned who were living at the time of the death of the deceased, George Handley, are now living, except the said Mary Handley, who died, without issue
8 or having been married, on the 28th day of September, 1879, and all said children are of age except Harvey L. Handley, who is sixteen years of age.

II. That on the fifth day of March, 1890, Sarah A. Chapman, Ruth A. Newsom, Benjamin T. Handley, and Harvey L. Handley filed their petition in the probate court of Salt Lake county, setting forth substantially the facts in the first finding hereinbefore set out

and praying in said petition that said probate court make an order "that said estate be divided among and distributed to the heirs-at-law according to their respective interests, and that one-half of said estate may be apportioned to your petitioners."

Upon the filing of which petition publication was duly made, as required by law, in the Salt Lake Herald, a newspaper published in Salt Lake City and county, Utah Territory, and notices duly posted, requiring all parties to appear at the hearing of the matters in said petition set up on the 4th day of April, 1890, at 10 o'clock a. m., when and where Arthur Brown and Hoge & Burmester, attorneys for John Handley, William F. Handley, Charles J. Handley, Emma N. Handley, and Elizabeth Handley, appeared and contested with said petitioners their right to have one-half of said estate partitioned to them; and upon said contest the court, on the 9th day of April, 1890, made and entered its final decree, denying the prayer of said petitioners.

Thereupon an appeal by said petitioners from said final decree of said probate court was duly prosecuted to this court by the filing and executing of proper notices and undertaking, as required by law, and the matters arising thereon and said case is now properly before this court for adjudication.

9 III. It is stipulated by the parties hereto that the foregoing are the facts of the case, and upon which the question arises for the court to decide: Are the petitioners entitled to be recognized as heirs-at-law of the said George Handley, deceased, and as such entitled to participate in the distribution of his estate heretofore set out and mentioned?

And now, upon the whole case, the court is of opinion and doth conclude as matter of law that said petitioners are not, under the laws of the Territory of Utah and of the United States, entitled to any part of the estate of the said George Handley, deceased, and their petition is hereby dismissed with costs.

Dated May 3d, 1890.

T. J. ANDERSON, *Judge.*

10 In the District Court for the Third Judicial District of Utah Territory, County of Salt Lake.

Judgment.

Be it remembered that on this 3rd day of May, 1890, this cause came on to be heard before the Honorable Thomas J. Anderson, one of the judges of said court, when, after due consideration thereof and upon the finding of facts and conclusions of law filed herein—

It is further ordered, adjudged, and decreed that said petitioners take nothing by their petition, and that the same be dismissed at their costs.

It is now ordered, adjudged, and decreed that the said respondents shall have and recover of and from said petitioners their costs of suit, here taxed at $15.00, and that they have execution therefor.

Dated May 3rd, 1890.

T. J. ANDERSON, *Judge.*

11 In the District Court for the Third Judicial District of Utah Territory, County of Salt Lake.

In the Matter of the Estate of GEORGE HANDLEY, Deceased.

Notice of Appeal.

To Henry G. McMillan, clerk of said court, and to Arthur Blown and Hoge & Burmester, attorneys for the defendants, for Elizabeth Handley, John Handley, William F. Handley, Charles T. Handley, and Emma N. Handley:

Take notice that the plaintiffs, Sarah J. Chapman and others, petitioners for distribution, appeal to the supreme court of Utah
12 Territory from the judgment and conclusions of law and the decree of the court, and from the whole thereof, rendered and entered in the above-entitled action in favor of said defendants and against said plaintiffs on the 3d day of May, 1890.

SUTHERLAND & JUDD,
Attorneys for Plaintiffs.

Dated May 5, 1890.

In the District Court for the Third Judicial District of Utah Territory, County of Salt Lake.

Certificate.

We hereby certify that the foregoing transcript, consisting of petition, stipulation, findings, judgment, notice of appeal, and the date of filing the same, respectively, are correct copies of the originals appearing of record in the above-entitled case in the third judicial district, Utah Territory, and that the proper and a sufficient undertaking on the appeal was given and filed.

(Signed) SUTHERLAND & JUDD,
Attorneys for Appellants.

" HOGE & BURMESTER,
ARTHUR BROWN,
Attorneys for Defendants.

13 In the Supreme Court of the Territory of Utah, June Term, 1890.

THURSDAY, *June 5th, A. D.* 1890.

Present and presiding: All the justices thereof.

In the Matter of the Estate of GEORGE HANDLEY, Deceased; SARAH A. CHAPMAN *et al.*, Appellants & Petitioners,
vs.
ELIZABETH HANDLEY *et al.*, Defendants & Respondents.

From Third District. Before Thos. J. Anderson, Judge.

This cause, coming on regularly for hearing, was argued by J. W. Judd for appellants (Anderson, A. J., not sitting).

FRIDAY, *June 6th, A. D.* 1890.

Present and presiding: All the justices thereof.

In the Matter of the Estate of GEORGE HANDLEY, Deceased;
SARAH A. CHAPMAN *et al.*, Appellants & Petitioners,
vs.
ELIZABETH HANDLEY *et al.*, Defendants & Respondents.

14 This cause was further argued by Arthur Brown on behalf of respondents, by J. G. Sutherland for appellants (Anderson, A. J., not sitting), was submitted, and taken under advisement.

MONDAY, *July 28th, A. D.* 1890.

Present and presiding: All the justices thereof.

In the Matter of the Estate of GEORGE HANDLEY, Deceased;
SARAH A. CHAPMAN *et al.*, Appellants & Petitioners,
vs.
ELIZABETH HANDLEY *et al.*, Defendants & Respondents.

This cause having been heretofore argued and submitted and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed.

Opinion of the court by Henderson, J. Zane, Ch. J., concurs. Blackburn, J., dissents and files separate opinion.

Thereupon counsel of appellants pray the allowance of an appeal from the judgment of this court rendered herein to the Supreme Court of the United States, and ask that the amount of a bond to be given thereon be now fixed; whereupon it is ordered that said
15 appeal be, and it is hereby, allowed, and the amount of a bond to be given thereon is fixed at $300.

Counsel further ask that this court adopt the findings of facts made by the district court therein as the findings of this court to accompany the record on appeal to the Supreme Court of the United States. Respondents objecting, the matter was taken under advisement.

TUESDAY, *July 29th, A. D.* 1890.

Present and presiding: All the associate justices thereof.

In the Matter of the Estate of GEORGE HANDLEY, Deceased;
SARAH A. CHAPMAN *et al.*, Appellants & Petitioners,
vs.
ELIZABETH HANDLEY *et al.*, Defendants & Respondents.

In this cause it is ordered that the findings of fact made by the district court therein be, and the same are, adopted as the findings of this court to accompany the record on an appeal heretofore allowed in this cause to the Supreme Court of the United States.

16 In the Supreme Court of the Territory of Utah, June Term, 1890.

In the Matter of the Estate of GEORGE HANDLEY, Deceased; SARAH A. CHAPMAN, RUTH NEWSON, BENJ. T. HANDLEY, and HARRY HANDLEY, Appellants & Petitioners, *vs.* ELIZABETH HANDLEY, JOHN HANDLEY, WM. F. HANDLEY, CHARLES T. HANDLEY, and EMMA N. HANDLEY, Defendants & Respondents.	From First District. Before T. J. Anderson, J.

Appearances: Sutherland & Judd, attorneys for petitioner-; Hoge & Burmister and Arthur Brown, attorneys for respondents.

HENDERSON, *J.:*

The appellants, Ruth A. Newson, Benjamin T. Handley, Harry L. Handley, and Sarah A. Chapman, petitioned the probate court for a distributive share of the estate of George Handley, deceased, as his heirs-at-law. Their petition was denied in the probate court, and they appealed to the district court, where the judgment of the probate court was affirmed, and they appeal to this court.

17 The facts are that George Handley died intestate on the 25th day of May, 1874, leaving an estate valued at $25,000.00. He left surviving him Elizabeth Handley, his widow, and eight children, named respectively John Handley, William Handley, Charles J. Handley, Emma N. Handley, Mary F. Handley, Ruth A. Newson, Benjamin T. Handley, and Harry F. Handley, the last three of whom are petitioners and appellants herein. The first four children above named were all children of the deceased and Elizabeth Handley, his lawful wife, and the last four were children of the said deceased and Sarah Chapman, his plural wife, married to him according to the tenets and rites of the Mormon church, and were the fruit of that polygamous relation. All these children are still living except Mary, one of the polygamous wife's children, who died sole and intestate September 28th, 1879, and her mother, Sarah A. Chapman, has succeeded to her interests. The petitioners and appellants, therefore, are the polygamous children and the polygamous wife (the latter claiming as heir of her deceased daughter) of the deceased; and the only question presented by the record is whether the surviving polygamous or illegitimate children are heirs-at-law of the deceased and entitled to share in his estate the same as the children born in lawful wedlock. The appellants base their claim upon the provision of an act of the territorial legislature approved March 3rd, 1852, Comp. Laws 1876, pages 268 and 269, section 677, which reads as follows: "Illegitimate children and their mothers inherit in like manner from their father,

18 whether acknowledged by him or not, provided it shall be made to appear to the satisfaction of the court that he was the father of such illegitimate child or children."

This statute, so far as territorial enactments are concerned, was

the one in force at the time of *descendant's* death. On the part of the respondents it is contended, first, that this statute was annulled by the anti-polygamy act of Congress, approved July 1st, 1862; second, that the act is against public policy, and therefore void. The anti-polygamy act above referred to is as follows: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every person having a husband or wife living who shall marry any other person, whether married or single, in a Territory of the United States or other place over which the United States have exclusive jurisdiction shall, except in the cases specified in the proviso of this section, be adjudged guilty of bigamy, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars and by imprisonment for a term not exceeding five years: Provided, nevertheless, that this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years without being known to such person within that time to be living, nor to any person by reason of any former marriage which shall have been dissolved by the decree of a competent court, nor to any person by reason of any former marriage which shall have been annulled or pronounced void by the sentence or decree of a competent court on the ground of the nullity of the marriage contract.

SECTION 2. And be it further enacted, That the following ordinance of the provisional government of the State of Deseret, so called, namely, 'An ordinance incorporating the Church of Jesus Christ of Latter Day Saints,' passed February 8th, in the year eighteen hundred and fifty-one, and adopted, re-enacted, and made valid by the governor and Legislative Assembly of the Territory of Utah by an act passed January 19th, in the year eighteen hundred and fifty-five, entitled 'An act in relation to the compilation and revision of the laws and resolutions in force in Utah Territory, their publication and distribution,' and all other acts and parts of acts heretofore passed by the said Legislative Assembly of the Territory of Utah which establish, support, maintain, shield, or countenance polygamy be, and the same are hereby, disapproved and annulled: Provided that this act shall be so limited and construed as not to affect or interfere with the right of property legally acquired under the ordinance heretofore mentioned, nor with the right 'to worship God according to the dictates of conscience,' but to only annul all acts and laws which establish, maintain, protect, or countenance the practice of polygamy, evasively called spiritual marriage, however disguised by legal or ecclesiastical solemnities, sacraments, ceremonies, consecration, or other contrivances."

By the organic act approved September 9th, 1850, relating specially to Utah Congress conferred upon the territorial legislature the right to legi-late upon "all rightful subjects of legislation," but reserved to itself the right to disapprove and thereby annul. Congress being the supreme legislative authority over the Territories, it would have this right of disapproval and to annul any territorial law, whether it was reserved or not.

National Bank *vs.* County of Yankton, 101 U. S., 129.

If, therefor-, the territorial statute above quoted or that part of it which provides that illegitimate children inherit from their father was disapproved and annulled by the anti-polygamy act above quoted, then the petitioners' claim — properly denied, and this question is solved by determining the character of the territorial act.

Is it an act or "part of an act" which establishes, supports, maintains, shi*e*lds, or countenances polygamy?

In determin-g the character and meaning of a legislative act the surrounding circumstances existing at the time of its passage, as shown by contemporaneous history, should be considered.

Endlich, in his work on the Interpretation of Statutes, sec. 29, thus states the rule:

"The interpretor, in order to understand the subject-matter and the scope and object of the enactment, must, in Coles' words, ascertain what was the mischief or defects for which the law had not provided—that is, he must call to his aid all those external or historical facts which are necessary for that purpose and which led to the enactment. He must refer to the history of the times to ascertain the reason for and the meaning of the provisions of the statute, and to the general state of opinion, public, judicial, and legis-
21 lative, at the time of the enactment. * * * For this purpose the court, in interpreting the statute, will take judicial notice of contemporaneous history, or it may consult contemporary or other authentic works or writings." In determin-g the meaning and effect of this statute, therefore, we are to consider that at the time the statute was passed the Territory had but recently been settled and organized; that it was inhabited almost exclusively by people who believed in polygamy and plurality of wives and families as a part of their religious faith, and that its practice was common among them; that the legislative bodies elected by these people sought to support, shield, maintain, and countenance it. The result of polygamy as a practice would be what would be known to the law as illegitimate children; indeed, that would be its fruit. There was no provision of law by which these illegitimate children or their mothers could inherit from the father. This was the unquestioned condition in this Territory when this statute was enacted, and, in view of it, I have no doubt that it was intended to and did tend to support, maintain, and countenance polygamy. Imagine a woman approached with a proposition of polygamy. Under such circumstances—no public sentiment against it to deter or hinder—the anxious inquiry would be as to the legal status and rights of herself and children. By this statute they were provided for, but it is contended that it would tend to deter men from entering into polygamy and would tend to create a sentiment against it on the part of legal wives, but this would not be so as to people who believe in it. It cannot be doubted that if polygamy was right this
22 would be a proper provision, and its advocates must so regard it.

It is further contended that the provisions of the territorial statute in favor of illegitimate children is a proper measure for the protection of an unfortunate and innocent class of persons, and that the

act of Congress should not be construed to prevent it; that it was not the intention of Congress to go beyond the guilty parties in imposing penalties or inflicting punishments.

This view has been urged most eloquently and with great ability by the learned counsel for the appellants. It must be understood that Congress was legislating against polygamy as an institution; that it intended to disapprove of all that tended to establish, support, countenance, or maintain; it sought to lessen and prevent injustice to illegitimate children by breaking up and destroying the system that applied and produced them. In monogamous communities, as is well understood, the universal moral sentiment makes a plain distinction between the "ill begotten" and the "lawful born," and, however much we may pity and sympathize with the innocent suffer-s from this sentiment, it must be acknowledged that its existence is one of the potent factors in preventing social and sexual irregularities. Congress has recognized the potency of denying to illegitimate children the rights of legitimacy and inheritance as a means of breaking up and discouraging polygamy in the acts of 1882 and 1887.

22 Statute at Large, 31; 24 Statute at Large, 637. It is provided that illegitimate children begotten thereafter shall
23 not inherit, and so emphatic is the language of the latter act that it may well be doubted whether testamentary provision can be made for them. On the argument it was contended that that law of '82, *supra*, provided that illegitimate children begotten thereafter should not inherit; that this would have been unnecessary if Congress had, as contended in 1862, annulled the territorial act, and this is claimed as evidence that Congress did not so construe the law of 1862, but it will be seen that the act of 1882 legitimates polygamous children begotten before its passage. If, under the territorial law, they already inherited "in like manner" as legitimate children this would have been unnecessary. To my mind all this is only evidence that Congress intended to legislate upon all these subjects for itself primarily and without reference to the territorial enactments except to disapprove and annul all acts or parts of acts thereof which tend to encourage or countenance polygamy. It is contended Congress did not intend to annul this territorial provision and did not regard it as one of the acts that countenanced and protected polygamy, because it has at least twice made similar provisions, but the acts referred to only legitimate children born before and within a short period after the passage of the act. The object of extending the provisions to children born within a few months after the act, placing them on an equality with those born before, is too obvious to require mention. Substantially, these acts — only — legitimate children begotten prior to their passage and publication. It is a concession in favor of illegitimates
24 then begotten, and, as before stated, this is coupled with a provision denying the right of inheritance to those begotten thereafter. The territorial act, on the contrary, establishes a continuing rule that runs with the future. In this respect there is the same difference between the territorial and Federal acts that there

would be between a pardon granted for a past offense and a commission to go forth and commit an offense in the future with impunity.

I am of the opinion that the territorial act was disapproved and annulled by the anti-polygamy act above referred to, and that the judgment appealed from should be affirmed.

(Signed) Zane, C. J., concurs.

Marked: Title court & cause. Opinion. Filed July 28th, 1890. Jos. P. Bache, clerk.

25 In the Supreme Court of the Territory of Utah.

In the Matter of the Estate of GEORGE HANDLEY, Deceased; SARAH A. CHAPMAN, RUTH NEWSON, BENJ. T. HANDLEY, and HARRY HANDLEY, Appellants & Petitioners, *vs.* ELIZABETH HANDLEY, JOHN HANDLEY, WM. F. HANDLEY, CHARLES T. HANDLEY, and EMMA N. HANDLEY, Defendants & Respondents.	From First District. Before T. J. Anderson, Judge.

Appearances: Sutherland & Judd, attorneys for petitioners; Hoge & Burmister and Arthur Brown, attorneys for respondents.

BLACKBURN, *J.*:

I am compelled to dissent in the opinion of the court. The facts are not in dispute and are as stated. The only question is, Was the law such in 1874, when the decedent died, that an illegitimate or polygamous child was entitled to share in his father's estate? By the law of 1852 of the Territory of Utah illegitimate children inherit in like manner from the father, whether acknowledged by him or not, provided it shall be made to the satisfaction of the
26 court that he was the father of such illegitimate child or children. In like manner (referring to other portions of the act) means as legitimate children. There is no question made nor could any be successfully made that the rights of illegitimate children is a rightful subject of legislation. Therefore, if this law was in force at the time, in 1874, when the decedent died, there can be no doubt that the appellants were entitled to a share of this father's estate.

It was in force so far as any act of the territorial legislature at that time was concerned, for it had not been repealed or changed by that body.

But the contention of the respondents is that it was annulled by the act of Congress of 1862, found in 1 C. T. of Utah, p. 109, sec. 2, which annuls the act in the Territory of Utah incorporating the Church of Jesus Christ of Latter-Day Saints and all other acts or parts of acts heretofore passed by said Legislative Assembly of the Territory of Utah which establish, support, maintain, shield, or countenance polygamy and the certain cases by providing "that

the purpose of this act shall be only to annul all acts and laws and parts of laws which establish, maintain, or countenance the practice of polygamy, evasively called spiritual marriage, however disguised by legal or ecclesiastical sacraments, ceremonies, conversations, or other contrivances."

It is contended that act of Congress annuls the act of the legislature of Utah giving the right to illegitimate children to share in the father's estate, because such right of inheritance supports, maintains, and encourages polygamy.

27 The purpose of the act of Congress of 1862 was to define and punish polygamy and to annul all laws of the Territory in any way making it legal or giving it countenance and support. Nothing is said in the act of Congress in reference to the rights of illegitimate children, and if that subject was in the mind of Congress it would have been expressed and not left in doubt or uncertainty.

Courts do not favor the repeal of laws by implication, and laws are never interpreted to repeal former laws, unless the two are so repugnant that they cannot both be administered and allowed to stand.

U. S. *vs.* 67 Packages, 17 How., 85.
Red Rock *vs.* Henry, 106 U. S., 396.
Ex Parte Crow Dog, 109 U. S., 556.
Chew Heauge *vs.* United States, 112 U. S., 556.

And certainly the same course of interpretation applies with equal, if not more, force to the annulling of laws. The law of the Territory was before the Congress, and how much easier it would have been to annul this territorial act by name, if it had intended that, than to have left its annulling to judicial interpretation by a sweeping clause that reads more like the sounding up of sentences in a stump speech than a solemn act of the highest legislature of the nation. This law of inheritance was before Congress, and *9f* the meaning is to be given to these general words claimed it clearly abdicated its functions and left to the courts to make and annul

28 laws by judicial interpretation. It cannot be supposed Congress intended any such thing. Courts are human, and sometimes not overburdened with wisdom, and it would be, if such a thing can be supposed, a more dangerous exercise of legislative authority to form laws so as to leave to judicial interpretation their enlargement and annulling; when the law would begin and when it would end would be left to conjecture and uncertainty. The law is uncertain enough, interpreted as best it may be by the courts, and if the interpretation contended for was given conjecture and uncertainty would be vastly increased. "It is always to be presumed that the legislature when it entertains and intention will express it, and that in clear and explicit terms."

Potter's Dwaris, 219.

If this territorial law is annulled a right is taken away, and all such laws are in the nature of a penalty and are *stricti juris* and are not to be extended by intendment.

Another course of construction in such statutes is, that where general words follow the enumeration of particular cases such general words are held to apply to cases of the same kind as particularly mentioned; for example, "an act of pasture meant provided whoever stole sheep or other cattle should be deprived of the benefit of clergy, and the courts held that other cattle only meant sheep."

Potter's Dwaris, pp. 220 to 227.

The words of the acts of Congress that it is claimed annul the act of the Utah legislature are which "establish, support, maintain, shield, or countenance polygamy," etc.; afterwards there are
29 words of explanation, but words of explanation cannot enlarge the meaning of the words they are intended to explain. These words are to be interpreted according to their common or ordinary meaning.

Allowing illegitimate children to inherit from their fathers does not establish polygamy; does not support it; does not maintain it; does not shield it; does not countenance it, for it is consistant with the severest punishment of polygamy and its entire overthrow that illegitimate children should inherit from their fathers.

Therefore I do not think it repeals or annuls the act of the territorial legislature giving to illegitimate children the right to inherit. I am strengthened in this opinion by the act of Congress of 1882, called the Edmunds act, sec. 7. *If* that clearly shows that it was not the intention of Congress to disinherit polygamous children, for it says all polygamous children born before the 1st day of January, 1883, shall be legitimate, making it clear that in the mind of Congress *that* nothing was intended by the act of 1862 to disinherit polygamous children. The act of the legislature of Utah says nothing about polygamous children; it only says illegitimate children, but the act of Congress goes further and says polygamous children shall be legitimate. If, therefore, the territorial law by inference encouraged and countenanced polygamy much more did the law of Congress, and that idea cannot be entertained for one moment.

Again, the act of Congress of 1887, in the 11 sec., provides that no illegitimate children shall hereafter inherit from their
30 parents, and annuls all laws of the Territory in reference thereto, but continues the power to inherit to all children born within twelve months after the passage of this act. So that if allowing illegitimate children to inherit from their fathers encourages polygamy Congress is guilty of fostering that institution; for the period of gestation is nine months. That leaves three months for men to beget illegitimate children and encourages polygamy for that length of time. But does in the nature of things the permission of illegitimate children to inherit of their fathers encourage or countenance polygamy? If so, how? It would certainly increase the hostility of the lawful wife to polygamy, and the opposition of her children for it would lessen their inheritance, and it would not increase the man's passions or his love of lechery and dissoluteness. It only takes from the illegitimat*r* the stain of bastard, and

places it in a plain where it will not be an outcast without recognized relationship or family.

Looking over these statutes and remembering the condition of things in the Territory of Utah at the time, I am forced to the opinion — the act of Congress of 1862 did not annul the act of the legislature of Utah of 1852 allowing illegitimate children to inherit. It certainly did not in terms and cannot be made to only by an interpretation that amounts to judicial legislation. Why should Congress leave to the courts to hunt out the laws of the Territory it intended to annul when the laws of the Territory were before it? Whose duty was it to point out the laws that maintain and encourage polygamy—the Congress or the courts? If Congress pointed them out the question was definitely settled. If left to the
31 courts uncertainty would arise and differences of interpretation would invariably occur, and the administration of the law would be rendered uncertain. These remarks only show that it could not have been the intention of the Congress to leave to judicial acumen the finding of those laws of the Territory that might be thought to maintain and encourage polygamy.

It is said, however, that that part of the law which allows the mother of illegitimate children to inherit clearly encourages polygamy. That question is not in this case, and if courts decide the questions before them they will be busy enough. But it may be remarked that it does not follow that because the mothers of illegitimate children are allowed to inherit encourages polygamy that the inheritance of their children would or does encourage that vile practice. The Congress may have had the allowance of mothers of illegitimate children to inherit when it used the expression "parts of laws." I do not think it follows that Congress when it passed the law of 1862 had in mind the right of illegitimate children to inherit from their fathers as encouraging and supporting polygamy, because it was well known at that time that it was extensively practiced in Utah Territory.

The right of illegitimate children to inherit from their fathers has been universally upheld and permitted from 1852 until now, and the title to much property is based upon its validity, and courts will and ought not to declare that law invalid without weighty reasons.

32 I think the law of the territorial legislature of 1852 was in force at the time Lewis Handley died, and that the appellants are entitled to share in this estate.

Marked: Title court & cause. Dissenting opinion. Filed July 28th, 1890. Jos. P. Bache, clerk.

33 By the Honorable Charles S. Zane, chief justice of Utah.

To Elizabeth Handley, John Handley, William F. Handley, Charles T. Handley, and Emma N. Handley, and to Arthur Brown and Hoge & Burmester, their attorneys, Greeting:

Whereas Sarah A. Chapman, Ruth Newsom, Benj. T. Handley and Harvey Handley have lately appealed to the Supreme Court of

the United States from a judgment and decree rendered in the supreme court of Utah Territory in favor of you, the said Elizabeth Handley, John Handley, Wm. F. Handley, Chas. T. Handley, and Emma N. Handley, and have filed the security required by law: You are, therefore, hereby cited and admonished to be and appear before the Supreme Court of the United States, at the city of Washington, D. C., on the second Monday of October next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand, at the city of Salt Lake, in the Territory of Utah, this 25 day of August, A. D. 1890.

C. S. ZANE,
Chief Justice of Utah Territory.

Due service of a copy of the above citation admitted.

ARTHUR BROWN,
HOGE & BURMESTER,
Att'ys for Def'ts.

34 [Endorsed:] Supreme court of Utah. File No. 94. Sarah A. Chapman *et al.*, appellants, *vs.* Elizabeth Handley *et al.*, respondents. Citation (original). Filed Aug. 26, 1890. Jos. P. Bache, clerk supreme court, Utah.

35 Know all men by these presents that we, W. F. Raybould and E. A. Tripp, both of the city and county of Salt Lake and Territory of Utah, are held and firmly bound unto Eliz. Handley, John Handley, Wm. F. Handley, Chas. T. Handley, and Emma N. Handley, their heirs, executors, administrators, or assigns, in the full and just sum of three hundred dollars ($300), lawful money of the United States of America, to be paid to the said Eliz. Handley, John Handley, Wm. F. Handley, Chas. T. Handley, and Emma N. Handley, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and assigns, firmly by these presents.

Sealed with our seals and dated this 16th day of August, A. D. 1890.

Whereas lately, at a term of the supreme court of the Territory of Utah, on the 28th day of July, A. D. 1890, of said term, in a suit depending between Sarah A. Chapman, Ruth Newsom, Benj. T. Handley, and Harvey Handley, as appellants, and the said Eliz. Handley, John Handley, Wm. F. Handley, Chas. T. Handley, & Emma N. Handley, as respondents, judgment was rendered against the said appellants and in favor of the said respondents, and the said appellants having obtained the allowance of an appeal from said judgment rendered in the supreme court of Utah to the Supreme Court of the United States to reverse the said judgment in the
36 aforesaid suit and a citation directed to the said respondents and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next:

Now, the condition of this obligation is such that if the said appellants shall prosecute the said appeal to effect and answer all

damages and costs if they fail to make their said plea good, then the above obligation to be void; else to remain in full force and virtue in law.

(Signed) WM. F. RAYBOULD. [SEAL.]
E. A. TRIPP. [SEAL.]

Signed, sealed, and delivered in the presence of—
A. SCOTT CHAPMAN.

Approved as to form and sufficiency of sureties this 25th day of August, A. D. 1890.

JOSEPH P. BACHE,
Clerk Supreme Court of Utah Territory.

37 UNITED STATES OF AMERICA, } ss:
Territory of Utah, }

I, Joseph P. Bache, clerk of the supreme court of Utah, in pursuance of an appeal allowed in the case of Sarah A. Chapman, Ruth Newsom, Benj. T. Handley, and Harvey Handley, appellants, *vs.* Elizabeth Handley, John Handley, Wm. F. Handley, Chas. T. Handley, and Emma N. Handley, respondents, lately pending in said court, do return attached hereto a transcript of the record and proceedings, opinions, & bond, together with the original citation, all in and of said court and cause, to the Supreme Court of the United States, and I hereby certify that said attached transcript of said record and proceedings, opinions, & bond is a full, true, and complete copy of the several originals thereof on file or of record in my office.

Seal Supreme Court Territory of Utah, United States of America.

In witness whereof I hereunto set my hand and affix the seal of the supreme court of Utah Territory this 29th day of August, A. D. 1889, at Salt Lake City, Utah.

JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

Endorsed on cover: Case No. 14,191. Utah Territory supreme court. No. 808. Sarah A. Chapman, Ruth Newsom, Benjamin T. Handley, and Harvey Handley, appellants, *vs.* Elizabeth Handley, John Handley, William F. Handley, Charles T. Handley, and Emma N. Handley. Filed September 29, 1890.

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Office Supreme Court U. S.
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JAMES. H. McKENNEY.
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

SARAH A. CHAPMAN, RUTH NEWSON, BENJAMIN T. HANDLEY, AND HARVEY HANDLEY, APPELLANTS,

vs.

ELIZABETH HANDLEY, JOHN HANDLEY, WILLIAM F. HANDLEY, CHARLES T HANDLEY, AND EMMA N. HANDLEY, RESPONDENTS.

BRIEF FOR APPELLANTS.

J. G. SUTHERLAND,
Counsel for Appellants.

Star Print. Herald Block.

SUPREME COURT OF THE UNITED STATES

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vs.

ELIZABETH HANDLEY, JOHN HANDLEY, WILLIAM F. HANDLEY, CHARLES T HANDLEY, AND EMMA N. HANDLEY, RESPONDENTS.

BRIEF FOR APPELLANTS.

We assign as error that the court below erroneously decided that the appellants, being polygamous children in the Territory of Utah, are not entitled to inherit from their father, and that the Territorial statute purporting to give them such right was annulled by the anti-polygamy act of Congress passed in 1862.

The facts were found by the court below in accordance with the stipulation of the parties. The alleged error of the court below was in a single legal deduction from those facts. George Handley died February 24th, 1874, leaving Elizabeth Handley, who was his lawful wife, and their four children (the respondents), and four children by a plural wife, one of whom died in infancy, her interest now represented by her mother as heir, (the appellants). The court below distributed the entire estate

to the lawful wife and her four children, holding that the children of the plural wife were not entitled to inherit.

A statute enacted by the Legislative Assembly of Utah, in 1852, provided: "Section 25. Illegitimate children and their mothers inherit in like manner (as legitimate) from the father, whether acknowledged by him or not, provided it shall be made to appear to the satisfaction of the court that he was the father of such illegitimate child or children."

C. L. Utah, 1876 Sec. 677.

This statute was held inoperative—held to have been annulled by a provision in the anti-polygamy law enacted by Congress in 1862. Record pages 7 and 8. The question on this record, therefore, is precisely the same as that determined by this court in Cope v. Cope, 137 U. S. 682. I invoke the doctrine of that case.

The value of the estate is found to be $25,000. The appellants' rights are the same and from the same source. They united in asking the Probate Court in which the estate was administered, for recognition as heirs at law of the decedent; that one-half of the estate be apportioned to them They jointly prosecuted their joint claims in the Territorial courts and jointly appealed to this court. The aggregate value of their joint interests in the estate is more than $5,000. Therefore this court has appellate jurisdiction under the act of Congress of March 3d, 1883.

Shields vs. Thomas, 17 How. 3, 4.
New Orleans Pac. Ry. vs. Parker, 143 U. S. 42, 51.
Market Co. vs. Hoffman, 101 id. 112.
Gibson vs. Shufeldt, 122 id. 27, 30, 32, 33.
Davies vs. Corbin, 112 id. 36.
Freeman vs. Dawson, 110 U. S. 264.
The Connemara, 103 id. 754.

J. G. SUTHERLAND,
Counsel for Appellants.

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RECORD CASE NO. 14,191.

SUPREME COURT OF THE UNITED STATES.

SARAH A. CHAPMAN ET AL., APPELLANTS,

vs.

ELIZABETH HANDLEY, RESPONDENT.

RESPONDENT'S BRIEF.

E. D. HOGE,
ARTHUR BROWN,
Attorneys for Respondents.

SUPREME COURT OF THE UNITED STATES.

SARAH A. CHAPMAN ET AL., APPELLANTS,

vs.

ELIZABETH HANDLEY, RESPONDENT.

Now comes the said defendant, Elizabeth Handley, administratrix of the estate of George Handley, deceased, and moves to dismiss the appeal in this cause for the reason that this court has no jurisdiction of the same because the matter involved in the controversy in this case is less than five thousand dollars.

This motion is based upon the printed record, and the consideration of it involves the nature of the action.

This suit was brought in the Probate Court of Salt Lake County, Utah Territory, by a petition filed therein, and an order made thereon. The original order does not seem to have been printed in the record; only the judgment on the appeal is found. I suggest that the original order should appear here. However, the nature of the case sufficiently appears, and the facts and statement of the law. It was an application for final distribution in the estate of George Handley, deceased, and it appears from the petition that George Handley died on the 25th day of May, 1874, leaving a widow, Elizabeth Handley, who is the defendant here, and four children by her. He also left four illegitimate children and a polygamous wife, Sarah A. Chapman, who is the petitioner, and really the party on the other side. The

case stands, then, that the polygamous wife brings a petition in the Probate Court against the legitimate wife, praying for an order of distribution.

If this estate is to be divided among all the children, legitimate and illegitimate alike, in eight shares, then the share of each would be less than five thousand dollars. The appellant here, Mrs. Chapman, who was defeated in the court below, claims that because she is the mother of the four illegitimate children, she can unite their interests and in some joint manner proceed as if it were four illegitimate children against four legitimate ones. The interest of the four being thus joined would be more than $12,000, but the nature of the action is several and not joint. The proceeding is had under the Utah statute, II Compiled Laws, 1888. page 529, section 4261:

> "Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, legatee or devisee, the court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto; * * * *

And section 4262:

> "In the order or decree the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, and sue for in any court of competent jurisdiction and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal."

These are the provisions, and the only provisions under the statute for distribution. It will be seen at a glance that they are several in their nature, and not joint. It is not in the power of the eight children to ask for a joint distribution, but it is in the power of one of the eight children to ask for a distribution giv-

ing him one-eighth; they can have distribution giving to each of the eight his respective share, but not one giving to the four one-half the estate.

The case falls clearly within the reasoning and the rules laid down in the cases of

Shields vs. Thomas 17 How., 3, 4.
New Orleans Pac. Ry. vs. Parker, 143 U. S. 42, 52.

> "The true distinction is between cases in which there are several plaintiffs interested collectively under a common title, and those wherein the matters in dispute are separate and distinct, and are joined in one suit for convenience or economy."

This is not a case where the title of the estate is involved in any one proceeding by which the whole matter may be injured, or in which any collective action would lie. Each heir had the right to ask for his separate and distinct part, and, whether he asked by petition or not, the duty of the Probate Court was the same. As soon as the estate was settled, under the statute above quoted, the estate could be distributed on the petition of an heir, legatee or devisee, or of the administrator, or of the court itself. Distribution was the natural consequence of the existence of the estate, and as such each one of the heirs took his one-eighth or one-ninth part as the case might be. It is like the case of different salvors in admiralty, or of different persons having different interests. I refer to the authorities so frequently cited in this court on the same subject.

McCarthy vs. Provost, 103 U. S., 673.
Elgin vs. Marshall, 106 U. S., 578.
New Jersey Zinc Co. vs. Trotter, 108 U. S., 564.
Bruce vs. Manchester and Keene Ry., 117 U. S., 514.
N. E. Mortg. Co. vs. Gray, 145 U. S., 123.
Clay Center vs. F. L. & T. Co., 145 U. S., 224.
Henderson vs. Carbondale C. & C. Co., 140 U. S., 31.
Ex parte Phenix Co. 117 U. S. 369.

Chatfield v. Boyle, 105 U.S. 231.
Green v. Fisk. Lawyers Coop. Ed. U.S. Rgs. Vol. 26, 48

Paving Co. vs. Mulford, 100 U. S., 147.
Stewart vs. Dunham, 115 U. S. 64.
Russell vs. Stansell, 105 U. S., 304.
Seaver vs. Bigelows, 5 Wall., 209.
Ex parte B. & O. R. R. Co., 106 U. S., 5.

It is true, as stated in the brief of counsel for appellant, that the aggregate value of the shares of these heirs, who are the illegitimate children, exceeds $5,000.00, and it is true that their rights spring from the same source, but it is not true that they either have or can jointly prosecute their claim in any sense that it is joint. Any or all heirs may unite in asking a several distribution, but the court could not grant a joint distribution or judgment. It is not true that they have a joint claim in the territorial courts or in any other court. Their claim is several in its nature, and because the same amount is due to each, does not permit them to be joint any more than if two libellants have the same amount due to them, and if this case is sent back for hearing in affirmance or disaffirmance of the judgment of the court below, it will divide this estate into as many parts as there are heirs, and if the contention of plaintiff is correct there are eight parts.

Nor is it true that all the petitioners stand in equal or like position. While I admit above that their title sprang from the same source, it springs through a different rule in the case of one of the petitioners. This polygamous marriage took place in 1866, after the act of Congress had prohibited such marriages. The marriage was in violation of the Act of Congress, after it had been prohibited. The person who now claims as chief petitioner is the person who violated that law. The statute says, Laws of 1876, page 268, Section 25:

> "Illegitimate children and their mothers inherit in like manner from the father, whether acknowledged by him or not, provided it shall be made to appear to the satisfaction of the

court, that he was the father of such illegitimate child or children."

This section was before the court in the Cope case, 137 U. S., 682, but the facts of that case are not like this. That was a case where the polygamous marriage had taken place prior to 1862, not one where it took place in defiance of the act. That was a case where only the rights of the children were involved. Here the petitioner is the polygamous wife. She comes in on her own right under the clause quoted which says that illegitimate children and "*their mothers*" may inherit, or she comes in as the heir of one of the deceased illegitimate children, but in either event she cannot take advantage of the fruits of her own crime. The act which I last quoted had been passed prior to 1862, and the legislation of Congress annulling all the acts of the legislature in aid of polygamy certainly was intended to reach this clause, which involves the right of the mother of an illegitimate child to inherit. What could more directly aid polygamy than the act giving to the mother the right to inherit from the deceased? That is what is claimed here. In fact, under the claim of the petitioner in this case, the polygamous mother would have greater rights than the legitimate wife. They insist that the estate should be divided by eight, giving four parts to the illegitimate children and an extra one to the polygamous wife, whereas they deny the legitimate wife's right to any interest whatever under this petition.

The form in which these parties have presented their petition cannot change or increase their rights. Because they have joined in a petition they have no greater or different right than if the administrator had petitioned for distribution. It is a question not by whom or how the case should be got into court. The distribution is a proceeding *in rem* in an estate, and just as several when petitioned for by more than one heir as if it was petitioned for by the administrator or on the court's own motion.

The Probate Court, to which this petition was addressed, had

no jurisdiction to enter a decree in the language of the prayer, that is, all of the prayer. The Probate Court could decree that the estate be divided among and distributed to all the heirs at law, but it could not enter a decree that one-half of the heirs at law were entitled to be recognized as such. The effect might be the same, but the declaration prayed for that they be considered and recognized as heirs at law would be beyond the power of the Probate Court. All the Probate Court could do or had to do was to distribute equally the estate, and in doing that it must make allowance for advances that had been made to heirs; the amounts that would fall to each might be different, the administrator might have paid in advance some of the heirs; all that must be deducted, or some may have had property in their hands belonging to the estate uncollected which must be deducted, so the right of each heir stands independent of the right of any other in so far as they seek remedy by distribution.

For these reasons we ask that the case be dismissed for want of jurisdiction.

BRIEF FOR DEFENDANT, ELIZABETH HANDLEY.

Although this question has been before the court before, we take the liberty to submit to the court the brief used in the Supreme Court of Utah Territory.

That the polygamous wife and her children would not be allowed by the rules of the common law to participate in the distribution of this estate, must undoubtedly be conceded; so that resort must be had to some statute to justify them as being regarded as heirs, and entitled to a standing in this or any other court.

The counsel for appellant claims that Section 25 of the Territorial Act of 1852 makes them heirs.

It is there enacted that "illegitimate children and their mothers inherit in like manner from the father;" that is, the same as legitimate children and their mothers inherit.

The children of deceased by Mrs. Chapman are by the law illegitimate, and consequently they and their mother came within the exact designation of the above provision, and are entitled to inherit, and a standing in court, if the foregoing section is a valid law.

There is one way, and only one, to ascertain the motive that brought about such an extraordinary piece of legislation. The Court may take judicial notice of the social and political condition of the community within its jurisdiction. Contemporaneous legislation is often resorted to by the courts to enable them to arrive at a correct understanding of the making of legislative enactments.

The Mormon people, from the time of their first settlement in this Territory, have been the advocates of polygamy, and many of them actual polygamists. Polygamy was, prior to and at the passage of said act, an existing social condition. These people at that time constituted substantially the entire population. All legislators from the time of the organization of the Territory by Congress, if not actually polygamists and holding high ecclesiastical offices in this polygamous community, were polygamists to the extent of supporting and electing polygamists to all the principal offices in the Territory.

Consequently, polygamists shaped and absolutely controlled all local legislation. Under such conditions it is natural that there should have been some attempt to give legal and material countenance, support and shield to the institution; and when in connection with this disposition we consider the dependent relation of a Territory to the General Government; that any law passed by its Legislature was subject to be annulled by Congress at its pleasure, we cannot be surprised that this effort to shield polygamy should be couched in some obscure phrases, or lan-

guage which would be likely to escape public attention and especially the attention of Congress. It is also worthy of mention, as assisting us in arriving at the intention of the Legislature in enacting this law, that the Probate Courts throughout the Territory—most of the judges of these courts being for many years members of the Legislature—in administering this law have, ever since its enactment, uniformly treated polygamous wives and their children in the same manner as lawful wives and heirs are treated in the distribution of estates.

The interpretation thus uniformly given these provisions by Probate courts and extending through so long a period, we must necessarily conclude was well known to the members of successive Legislatures, which, as before stated, were composed largely of the Probate Judges of the several counties, as is well known, and the House and Council journals show.

No proposition has been made by any Legislature to correct this interpretation, if erroneous. It must, therefore, be considered the true one and the one substantially admitted in the brief for the appellants, wherein they state Congress only intended to annul such laws as directly supported, maintained and shielded polygamy, but no such law as did so in an indirect manner.

But the important question in this connection is, not so much what might have been the particular motives inducing this enactment, as it is to ascertain whether or not this section of the statute (Sec. 25, Laws of 1852) does, in fact, support, maintain, protect, shield or countenance polygamy, for if it does it was unquestionably within the annulling clause of the law of Congress, Section 2, July 1, 1862, which provides for the punishment of polygamy, etc. Without this act of the Territorial Legislature, the offspring of polygamous marriages would have no right or interest in the estate of their deceased father, nor would their mother be in a better situation as to property rights than such mothers would have been at common law. From an examina-

tion of the brief for appellants, we find that the counsel have ignored this particular expression of the section, having passed over in silence that portion which provides, that the *mothers* of illegitimate children shall inherit the same as mothers of legitimate children. And we presume the counsel did so purposely, knowing that the Act of Congress struck at that portion of the section by reason of its being a direct bid for women to go into polygamy, and become the mothers of illegitimate offspring. The interpretation we claim for this law leaves this unfortunate offspring with all the rights which belonged to them at common law.

The attorneys say that the common law was adapted to a barbarous age and a barbarous people. Somewhere it is said by one of our most eminent jurists, "that we were at all times surrounded with, lived in and breathed the common law."

At common law the polygamous wives and their children had no right to support, etc. out of the father's estate. But with this law in force, the polygamous wife and children become at once entitled to share equally with the lawful wife and her children in the fortune left by the husband and father. It would be difficult indeed to conceive of a plan better adapted to give material aid, countenance, support and shield to the institution of polygamy than this section of our statute. The legislative intent is wrought out in the practical operations of the law. With a view to prevent an expansion of the institution, Congress enacted the law of 1862, several years, in fact more than ten years, prior to the death of Handley, and thereby annulled Section 25 of the Law of Utah above cited. There was then no law in force, at the date of the death of Handley, which authorized this polygamous wife or her children to participate in the distribution of the assets, or which gave them, or either of them, any interest whatever in the property belonging to said estate.

The Constitution of the Territory is prepared by Congress, and not by the people. Every enactment by Congress becomes

a part of the Organic Law of Utah. So that, in construing the Acts of Congress, we are not to put them upon the same plane with the legislative enactments of the Territorial Legislature; but the former, the Acts of Congress, are to be construed as we construe constitutions. The acts of the Legislature are specific; the Acts of Congress are general. An Act of Congress approving, or disapproving a certain line of legislation of the local Legislature need not be specific, any more than the act of granting the authority to legislate. The grant of power in the first instance is general, vague as such grants of power always are in the delegation of power to make laws. The restriction upon the grant of power may be equally general. As applied to Utah, the Congress of the United States has made the restriction provided for in the Act of 1862, that they "shall pass no act or law which establishes, maintains, supports, shields, or countenances the practice of polygamy."

Had this language been incorporated into the first act with regard to Utah, the act creating the Territory, the argument that is made for this appellant certainly could have no application. He could not be heard to say that it was a repeal, and therefore should have little weight, or that it was a general clause, and therefore should not be construed at all. And yet, that is precisely the light in which this clause is to be construed. Congress could not go into the detail of legislation of the Territory, and select out the language and words which had filled all the statute books which supported polygamy. They pointed out one great act definitely, and then, discovering and seeing as the fact is, that the Legislature of Utah had incorporated the protection of polygamy through all their different statutes and books, with one sweeping clause they disapproved and annulled *"all other"* acts and parts of acts theretofore passed by the Legislature of the Territory, which established, maintained, supported, shielded or countenanced polygamy.

The argument that has been addressed by the appellant in this case would entirely disregard and set aside that part of the Act of Congress which is above quoted, and would limit its application solely to the act specified. And yet Congress must be assumed to have had some meaning, and a definite one, when they thus specifically and pointedly referred to "*all other acts and parts of acts.*"

The legislation which we are now discussing was one of the most seductive arguments in favor of polygamy. If allowed to stand, the polygamous wife is not punished for her crime, or her part in the crime of her husband, but she is rewarded by being allowed to inherit the estate of her husband. Her children were not made illegitimate, but they were to stand upon the same plane, and viewed in the same favorable light as the legitimate children. Could any reasoning be brought to bear upon the mind of the doubtful female more ingenious, or more inclined to induce her to submit to the polygamous relation, than that contained in this act of the local Legislature. It was passed for that purpose. Its peculiar phraseology is designed, not to meet ordinary cases of illegitimate children, but the exact status that we had here in Utah in the polygamous relation. As an act of humanity, other legislatures may have sometimes enabled illegitimate children to inherit; but nowhere before can any statute be found which authorizes the co-partner in a crime, the illicit mistress to be rewarded for her crime, by being permitted to inherit equally with the lawful wife. Yet in this case, the woman who gives the names to the titles of this cause is asking to take from the legitimate children of the deceased Handley a part of that estate, that it may be bestowed upon herself, to reward her for having violated the law of the United States.

The brief of counsel for the appellant assumes, without argument, or without authority, that the Act of Congress is to be construed merely as a repealing statute, and then at great length the learned counsel draws his deduction from that assumption.

We dispute with him the basis upon which that assumption is founded. If that assumption is false, it is idle for us, and unnecessary, to question whether his deductions from it are well or ill taken. Instead of being construed in that light, as we have attempted to argue, the Act of Congress must be construed as if on the date of its passage in 1862, the Constitution had been changed; and the question would then arise as to the validity of the prior legislation. But it is claimed in the brief of counsel that the subsequent legislation by Congress, known as the Edmunds and the Edmunds-Tucker Acts, being *in pari materia*, favors the local legislation.

Let us take it in its chronological order. The Act of the Territory, enabling the polygamous mother to inherit was passed first. Then comes the Act of 1862, already quoted. Then, in 1882, the Edmunds law was passed. By the Seventh Section thereof, Congress expressly made legitimate all children born of these polygamous marriages prior to the 1st day of January, 1873. Did this enactment look as if the Congress of the United States considered them already legitimate? Or, was it not an amnesty to the innocent sufferers of the past misconduct? And does it not look as if Congress by that section understood that, without its passage, these children would be illegitimate, and could not inherit?

While we do not ask for the legislative construction, the conclusive result that counsel claim in their brief, yet subsequent legislation, may be considered, and should be considered in construing doubtful statutes. And in construing the legislation on this subject, here is certainly an express declaration of Congress by the Act of 1882, that without their enactment the children of polgamous marriages prior to that time could not inherit, and would not be legitimate. But this section of the Act of 1882 by no means is a recognition of the Act of 1852 by the Territorial Legislature, and it differs from it very widely. It does not make

legitimate the illegal marriages which had theretofore been forbidden. It does not allow the polygamous wife to inherit.

If this Act of 1852 could be upheld by the courts, it not only legitimatizes the children, but it legitimatizes the marriages to the polygamous wives as well. It gives the polygamous wife the right to inherit as if she was the legal wife, and for all purposes it recognizes and enforces the polygamous marriage. Is that in harmony and in accordance with the Act of 1862?

The Edmunds-Tucker law, passed five years later, expressly specifies this enactment of 1852 as being contrary to the spirit of the laws against polygamy, and disapproves and annuls it by name. Such a declaration as that nowhere implies; but without such a disapproval, it would be a valid law. In fulfilment of that disapproval, Congress legitimatizes those that had passed before that act; but as to the future they still hold out the punishment that the children cannot be made legitimate. Thus we have the system of Congress harmonize; that, while it forbids these polygamous marriages, and refuses to recognize them or the results of them as such, yet as an amnesty to the past, Congress was willing to make legitimate the children. As a punishment to the future, however, and as a means of suppressing polygamy, they still announce the children born in the future will not be heirs of the father.

Here, then, is a legislative declaration that one of the means of suppressing polygamy, and preventing this sort of marriage and the production of this sort of children, is to render them illegitimate. If that was one of the means of discountenancing the practice in 1887, it was one of the means of discountenancing the practice in 1862. It is the declaration of Congress that the permission to inherit was one of the means "establishing, maintaining, supporting, shielding and countenancing polygamy," as this act did maintain, did countenance and protect the practice of polygamy, which must be held by this court to be annulled and disapproved by the Act of Congress.